

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF AUBURN,)	
)	
Petitioner,)	No. 80110-0
)	
v.)	En Banc
)	
TERESA A. HEDLUND,)	
)	
Respondent.)	Filed February 12, 2009
_____)	

Chambers, J. — Under Washington statutes, a person is not an accomplice to a crime if she is a victim of that same crime. Teresa Hedlund hosted a party where the liquor flowed freely. Following the party, Hedlund was the only survivor of a single car accident. Hedlund was seriously injured herself. She was charged in Auburn Municipal Court with (among other things) being an accomplice to driving under the influence (DUI) and reckless driving. At the close of the city of Auburn’s case in chief, the trial court dismissed the DUI and reckless driving charges because a victim may not be charged as an accomplice under RCW 9A.08.020. We recognize that the legislature may have intended a more limited application of the statute, but based upon the plain language of the law, we agree with the municipal court

judge and the Court of Appeals that Hedlund cannot be prosecuted as an accomplice. We affirm the Court of Appeals in part.

Facts and Procedural History

On July 16, 2001, a Ford Escort smashed into a concrete pillar in Auburn, killing the driver and five of the six passengers. Earlier in the evening, all the occupants of the car had been at a party at the apartment Hedlund shared with her mother, fiancé, and daughter. Hedlund was 28 at the time; the guests were between 17 and 22. Hedlund's four-year-old daughter was also present. One of the guests had brought a video camera, which was passed around to record the festivities. Most of those present, including the 17-year-old, were drinking alcohol and performing for the video camera. Hedlund's four-year-old daughter is also on camera with a lighted cigarette, dancing and performing at her mother's encouragement. Hedlund is heard asking her daughter to get the cigarettes, telling everyone to look at her daughter, and telling the girl to "shake your moneymaker." Clerk's Papers (CP) at 1188-89. At one point on the video, the four-year-old turns around, pulls down her pajamas, and bares her buttocks for the camera.

When Hedlund's mother came home, she threw the partyers out. Seven people squeezed into the two-door Ford Escort with four seat belts and the back window broken out. Jayme, the owner of the car and the only sober guest, was one of the two smallest people. She sat on someone's lap in the backseat. Also in the backseat were Hedlund's fiancé, Tim, and their friends

Marcus, Brandon, and April, the 17-year-old who was carried¹ unconscious into the car. At the wheel was Tim's twin brother Tom, who was heard earlier on the videotape declaring how "liquored up" he was. CP at 543, 1189.

No one saw the collision, but the events inside the car were preserved on the video camera. During the drive, Hedlund was in the front passenger seat, on her knees, facing the rear of the car, filming. The sober Jayme repeatedly screamed at Tom to slow down. When Hedlund asked Jayme if she wanted her (Hedlund) to drive instead of Tom, Jayme replied that she wanted Tom to stop the car. Hedlund said that Tom was only being funny. Tom then declared, "I'm going to kill us all right now." Seconds later, everyone but Hedlund was dead. Yaw marks on the pavement, together with the video, suggested that Tom put the car into a slide to scare his passengers, lost control, and hit the concrete pillar. The police determined the crash was caused by excessive speed and recklessness. Postmortem blood alcohol tests showed everyone but Jayme had been drinking and the driver's blood alcohol was at nearly twice the legal limit. Hedlund spent months in hospitals and rehabilitation as a result of the wreck.

The King County prosecutor declined to charge Hedlund and instead referred the case to the Auburn city attorney. The city charged Hedlund with

¹ The record does not clearly establish how April got into the car, but the parties seem to agree this is what occurred, and in the video segments filmed in the car, she appears unconscious.

DUI and reckless driving as an accomplice and with furnishing alcohol to minors. CP at 680-86.² After reviewing the videotape, the city added a charge of furnishing tobacco to a minor. *See* RCW 46.61.500 (reckless driving); RCW 46.61.502 (driving under the influence); RCW 66.44.270 (furnishing alcohol to a minor); RCW 26.28.080 (furnishing tobacco to a minor). The city's theory was that all evening, the camera was used to encourage inappropriate behavior and "showboating," which continued in the car because Hedlund kept filming. CP at 699-701, 716-17, 763. Hedlund unsuccessfully moved to sever the furnishing tobacco charge from the DUI, reckless driving, and furnishing alcohol charges.

The case was tried to a jury. At the end of the city's case in chief, the trial judge reluctantly granted Hedlund's motion to dismiss the reckless driving and DUI charges because "there's no way [the jury] could conclude that she was not also a victim." CP at 598. The city sought a writ of review to the superior court. Judge Cayce concluded that the statute, preventing a victim from being prosecuted as an accomplice, applied only to crimes that required a victim. He further concluded that because DUI and reckless driving do not require an injured victim, Hedlund was a victim of vehicular assault, not DUI or reckless driving. The court also rejected Hedlund's argument that continuation of the trial after the municipal court's dismissal

² This citation is to the transcript of the city attorney's closing argument and the judge instructing the jury; the parties did not designate the charging document or the actual jury instructions as part of the record on appeal.

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would violate double jeopardy. Hedlund's appeal was stayed pending the lower court's proceedings.

The Auburn Municipal Court trial proceeded, and the jury found Hedlund guilty of all charges except reckless driving. Hedlund sought a RALJ appeal. Superior Court Judge Roberts reversed all of the convictions because of cumulative errors. The city's appeal of that decision was consolidated with Hedlund's earlier appeal of the writ of review. *City of Auburn v. Hedlund*, 137 Wn. App. 494, 497, 155 P.3d 149 (2007). Division One of the Court of Appeals affirmed the reversal of the DUI conviction, concluding Hedlund was a victim of that crime. *Id.* at 503. It also held that double jeopardy barred reinstating the DUI charge after it had been dismissed and that the city's cross appeal of the trial errors was moot. *Id.* at 506.

Accomplice Liability

We review questions of statutory interpretation de novo. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). Under Washington law, "[u]nless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime." RCW 9A.08.020(5). The word "victim" is not specifically defined anywhere in the Washington Criminal Code, Title 9A RCW, or in Washington motor vehicle statutes, Title 46 RCW. Unrelated laws, such as the Sentencing Reform Act of 1981 (chapter 9.94A RCW) and the crime victims' compensation act (chapter 7.68

RCW) are in accord with the common understanding that a “victim” is a person who suffers injury as a direct result of a crime. *See* RCW 9.94A.030(46); RCW 7.68.020(3);³ Webster’s II New Riverside University Dictionary 1286 (1984) (“One harmed or killed by another.”); *cf.* Black’s Law Dictionary 1598 (8th ed. 2004) (“[a] person harmed by a crime, tort, or other wrong”).

The city argues the legislature simply could not have intended that anyone injured in a crime is absolved of accomplice liability. The city argues the statute does not apply because Hedlund was not yet a victim at the time she committed the acts, making her an accomplice to DUI. It notes the statute reads, “*is a victim*” not “*LATER BECOMES A VICTIM.*” Revised Opening Br. of Resp’t/Cross-Appellant at 9; *see* RCW 9A.08.020(5). We decline the city’s invitation to so define “victim.” This interpretation would render the statute meaningless because many accomplices provide assistance before a crime and many victims cannot be defined as such until the crime is

³ We respectfully disagree with our dissenting colleague’s characterization of our opinion as choosing the definition from the crime victims’ compensation act, chapter 7.68 RCW. Dissent at 2. We also respectfully disagree that our approach is inconsistent with that act. That act *defines* a “victim” as “a person who suffers bodily injury or death as a proximate result of a criminal act of another person.” RCW 7.68.020(3). This statutory definition accords with the approach we take and would clearly include Hedlund. Later in the act, it *exempts* from eligibility for benefits several categories of persons and injuries, including, as the dissent notes, injuries “[s]ustained while the *crime victim* was engaged in the attempt to commit, or the commission of, a felony.” RCW 7.68.070(3)(b) (emphasis added) (quoting dissent at 2). No similar exemption appears in the victim/accomplice statute. Instead, the exemption effectively acknowledges that a person can be both criminally liable and a victim. While the legislature could have definitionally excluded accomplices from the definition of “victim” for the victim accomplice rule, it did not and neither shall we.

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complete. Additionally, Hedlund's alleged encouragement of the DUI (the filming) continued up until moments before the crash that made her a victim.

The statute appears to be a codification of a much older common law rule dating at least back to an 1893 English statutory rape case, where the court reasoned that a law intended to protect young girls could not also hold them responsible as accomplices. *The Queen v. Tyrrell*, 1 Q.B. 710, 711-12 (1894); see also 2 Wayne R. LaFare, Substantive Criminal Law 369-70 (2003). The United States Supreme Court first applied the rule in *Gebardi v. United States*, 287 U.S. 112, 53 S. Ct. 35, 77 L. Ed. 206 (1932). The Court held that a prostitute could not be an accomplice to the crime of transporting herself across state lines. *Id.* at 118-23. Similarly, there are cases applying the rule to protect victims of criminal abortions and, more recently, battered women who invite their abusers to violate protection orders. *In re Pet. of Vickers*, 371 Mich. 114, 116-17, 123 N.W.2d 253 (1963); *City of North Olmsted v. Bullington*, 139 Ohio App. 3d 565, 571, 744 N.E.2d 1225 (2000). The history of the rule does not support the city's contention because in any of the examples above, the alleged accomplice/victim could easily have committed acts of encouragement well before becoming a victim, just as Hedlund is alleged to have done. This history does not indicate the rule applied only to those whose complicit acts occurred at the same time as their victimization.

The city also argues that Hedlund was not a victim of DUI but of

vehicular assault. While DUI liability does not depend on the existence of a victim, the law does contemplate the existence of victims. *See* RCW 46.61.5055(6)(a) (the court in a DUI case must consider whether the defendant “was responsible for injury or damage to another or another’s property”). We do not believe that DUI is a victimless crime.

It well may be that Judge Cayce was correct, and the rule should be limited to crimes that require a victim. Broadly applied, the statute protecting victims could lead to strange results. For example, one who knowingly provides fuel to an arsonist could be trapped in the fire. Or one who receives relatively minor injuries during a crime could be considered a victim. But the legislature has been quite clear: “a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime.” RCW 9A.08.020(5).⁴ We resist the urge to essentially rewrite such a plainly written statute. Should the legislature intend a more limited definition of “victim,” it, not this court, should amend that statute.

The results of the plain reading of the statute will not be as dire or as absurd as the city predicts because accomplices are usually not injured by the very crimes they assist. For example, someone injured helping a bank robber escape (perhaps by gunfire or automobile accident) is not the victim of the

⁴ We respectfully contend that the dissent would have more force if the accomplice liability statute had said that “the” victim of a crime could not be liable as an accomplice rather than “a” victim. *Cf.* RCW 9A.08.020(5). The exemption of “a” victim is expansive and seems to reasonably contemplate broad application. An exemption of “the” victim, by contrast, might point to a more restrictive scope.

robbery and can thus still be charged as an accomplice.

Finally, while we would not hesitate to condemn Hedlund's conduct as reprehensible and indeed criminal, neither do we find it absurd to say that she has been punished enough. Her lack of judgment permitted the loss of the lives of her fiancé as well as several friends, and she spent months rehabilitating from her own severe injuries; further legal penalties⁵ would be dwarfed by the suffering she has already endured. We reverse her conviction of DUI.⁶

Admission of Evidence

The Court of Appeals held the city's cross appeal was moot. *Hedlund*, 137 Wn. App. at 497. We disagree. The victim accomplice issue discussed above applies only to Hedlund's DUI conviction and does not affect her convictions for furnishing alcohol and tobacco to minors where she was charged as a principal, not an accomplice. Judge Roberts reversed all of Hedlund's convictions based on the cumulative effect of three errors: failing to sever the charge of furnishing tobacco to a minor, admitting the video of Hedlund's daughter smoking, and letting the jury hear the 911 call. We agree

⁵ The trial court sentenced her to 365 days, of which 364 days were suspended, a \$5,000 fine, of which \$4,650 was suspended, and the remaining \$350 she was permitted to pay through speaking to high schools about her experience, at a rate of \$100 per appearance. It appears that at the time of sentencing, Hedlund had already begun to do this of her own volition.

⁶ The Court of Appeals also held that double jeopardy was violated when the DUI charges were reinstated on the writ of review after the initial dismissal by the trial court. Because we reverse the DUI conviction on the ground that Hedlund is a victim, not an accomplice, we need not reach the double jeopardy issue.

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with Judge Roberts that trial error merits reversal on all the charges.

The admission of evidence is reviewed for abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 852, 809 P.2d 190 (1991). When its “probative value is substantially outweighed by the danger of unfair prejudice,” even relevant evidence may be excluded. ER 403. Evidence causes unfair prejudice when it is ““more likely to arouse an emotional response than a rational decision by the jury.”” *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). The advisory committee’s note to Federal Rule of Evidence 403 (which is identical to Washington’s rule) notes that unfair prejudice is commonly caused by emotion. Fed. R. Evid. 403, Advisory Committee Note. One Washington commentator has argued that unfair prejudice should be seen not as a matter of emotion, but of erroneous inferences that undermine the goal of the rules to promote accurate fact finding and fairness. *See generally* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 Wash. L. Rev. 497 (1983). Under either theory, we find that the prejudicial effect of this 911 call substantially outweighed its very minimal probative value.

Admission of the 911 tape was an abuse of discretion because the recording was inflammatory and of dubious probative value. The caller was excited, exaggerated the circumstances, and described a gruesome scene. While we are confident the exaggerations were unintentional, the caller

incorrectly reported that one of the victims was decapitated. Some of the more inflammatory excerpts from the tape are as follows: “Really bad. The (indiscernible) car’s torn off. There’s bodies, there’s a head cut off. We’re directly under – there – there’s three bodies in the road. There’s a head cut off.” “Oh, there’s legs cut off, heads cut off. And cars, trucks backing up bad now.” “There’s one, two, three – four bodies. One head cut off. It looks like a child.” “One head’s cut off. One, two, three, four – five bodies. I don’t think you guys want to see this.” CP at 782-84.

We find this situation analogous to the admission of gruesome crime scene photographs. In considering such photographs, we have reversed the customary presumption of admissibility under ER 403 and held that they are admissible if the probative value outweighs the prejudicial effect. *State v. Crenshaw*, 98 Wn.2d 789, 806-07, 659 P.2d 488 (1983) (cautioning prosecutors to use restraint in admitting gruesome and repetitive photographs when the criminal act is amply proved by noninflammatory evidence); *State v. Sargent*, 40 Wn. App. 340, 348-49, 698 P.2d 598 (1985) (holding the trial court had abused its discretion in admitting several photographs of a murder victim’s body).

Here, the gruesome nature of the crash is not related to any element of any crime charged. *See* RCW 46.61.502 (DUI); RCW 9A.08.020 (accomplice liability); RCW 46.61.500 (reckless driving); RCW 66.44.270 (furnishing alcohol to a minor); RCW 26.28.080 (furnishing tobacco to a

minor). The city argues the 911 call establishes where Hedlund was in the car. However, this much is well-established by the videotape and could easily have been asked of the caller on direct examination since she testified live at trial. *See* CP at 778. The city also argues this case is analogous to *Noltie*, where we held gruesome photographs were properly admitted so long as they were relevant and accurate. *Noltie*, 116 Wn.2d at 852. We do not see the comparison, since in this case, the city admits the most gruesome and repetitive aspect of the 911 tape was not accurate. *See* Revised Opening Br. of Resp't/Cross-Appellant at 44.

The use of the caller's assertion, repeated no less than five times during the call, that someone had been decapitated appears calculated to inflame the passions of the jury, especially since it was conceded to be untrue. CP at 782-84; Revised Opening Br. of Resp't/Cross Appellant at 44; *see also State v. Pendergrass*, 179 Mont. 106, 111-12, 586 P.2d 691 (1978) (holding trial court abused its discretion in admitting rape victim's 911 call because the "emotional and nearly incoherent outpourings of the victim in the immediate aftermath of a violent crime" necessarily induced a feeling of outrage against the defendant). Although the city claims the 911 tape could not be more upsetting than the deaths of six young people in a horrific accident, the tape was irrelevant, inaccurate, and inflammatory. We hold it was an abuse of discretion to admit it.

Judge Roberts also found it was an abuse of discretion to admit the

portion of the videotape showing Hedlund providing her young daughter with a lighted cigarette and encouraging her to smoke and dance bare bottomed for the camera. Although it was relevant to the charge of furnishing tobacco to a minor, Judge Roberts concluded this portion was highly prejudicial and inflammatory and should not have been admitted as evidence for the other charges of DUI, reckless driving, or furnishing alcohol to a minor. The evidence could have been eliminated by editing the videotape or granting the motion to sever charges. However, inasmuch as the DUI charges must be dismissed because Hedlund was a victim and cannot be tried as an accomplice and the furnishing alcohol and tobacco charges must be reversed because it was an abuse of discretion to admit the 911 tape, we find it unnecessary to reach this issue.

CONCLUSION

We resist the urge to rewrite a plainly written statute. The legislature has declared, “a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime.” RCW 9A.08.020(5). Should the legislature intend a more limited definition of victim, it may, in its wisdom, amend the statute. Based upon the plain meaning of the statute, we affirm the dismissal of Hedlund’s DUI conviction because, as a victim of the crime, she cannot be charged as an accomplice. We also reverse the convictions for furnishing alcohol and tobacco to a minor.

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AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Richard B. Sanders

Justice Debra L. Stephens
